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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

**PRESTON SMITH, an  
individual,**

**Plaintiff,**

**vs.**

**CITY OF BURBANK,  
BURBANK POLICE  
DEPARTMENT, BURBANK  
POLICE DEPARTMENT  
OFFICER GUNN; BURBANK  
POLICE DEPARTMENT  
OFFICER BAUMGARTEN;  
BURBANK DEPARTMENT  
POLICE OFFICER EDWARDS,  
AND DOES 1 TO 100, inclusive,**

**Defendants.**

**Case No.: CV 10-8840 R (AGRx)**

**Honorable Manuel L. Real**

**PLAINTIFF'S OPPOSITION TO  
MOTION FOR SUMMARY  
JUDGMENT**

**MEMORANDUM OF POINTS  
AND AUTHORITIES**

**DATE: July 2, 2012  
TIME: 10:00 a.m.  
COURTROOM: 8**

1 **TO THE ABOVE ENTITLED COURT AND TO ALL DEFENDANTS**  
2 **AND TO THEIR RESPECTIVE COUNSEL:**  
3

4 **PLEASE TAKE NOTICE** that Plaintiff Preston Smith submits the instant  
5  
6 Opposition to the Motion for Summary Judgment of Defendant Officer Gunn.  
7 This Opposition is asserted on the grounds that there are triable issues of fact  
8  
9 which preclude Summary Judgment.

10 Plaintiff's Opposition is based on the attached Declaration of Michael  
11  
12 Coletti, Esq., of the Law Offices of Manuel H. Miller, and the attached  
13 Memorandum of Points and Authorities.

14 **PLEASE TAKE FURTHER NOTICE** that Plaintiff Preston Smith hereby  
15  
16 applies to the above entitled court for an order either denying, deferring or  
17  
18 continuing the Motion for Summary Judgment of Defendant Officer Gunn until  
19  
20 discovery is complete. This application to deny, defer or continue the Defendants'  
21  
22 Motion for Summary Judgment is made pursuant to F.R.C.P., Rule 56 (d).

23 DATED: June 12th, 20112

LAW OFFICES OF MANUEL H. MILLER

24  
25  
26 By /s/ Michael Coletti  
27 Michael Coletti, Esq.  
28 Attorneys of Record of Plaintiff

- 2 -

Plaintiff's Opposition to Motion for Summary Judgment

**DECLARATION OF MICHAEL COLETTI, ESQ.**

I, Michael Coletti, Esq., declare and state as follows:

1. I am an attorney licensed to practice law before the above entitled court. I know the following facts of my own personal knowledge, except where stated on information and belief. If called upon and sworn as a witness, I could and would competently testify thereto.

2. This action arises out of the alleged actions of Defendant Police Officer Gunn and his employer/Defendant Burbank Police Department, in the course of, during and after the arrest of Plaintiff. This case was initially filed in the Los Angeles Superior Court and removed to this court at the request for removal by Defendant.

3. This case is set for trial to commence on August 7, 2012. Because of an on-going Internal Affairs Investigation of the Defendant police officers arising out of the events giving rise to this lawsuit, discovery was stayed until June 19, 2012.

1           4. As a result of the stay, Plaintiff has not yet been unable to complete  
2 discovery..

3  
4           5. Plaintiff is unable to completely and substantively respond to  
5 Defendants' *Heck* Motion for Summary Judgment without being able to present the  
6 deposition testimony of the Defendant Police Officers. The Defendants' *Heck*  
7 Motion is based on events that transpired in the course of, during and after the  
8 arrest of Plaintiff. The Ninth Circuit case of *Hooper vs. County of San Diego*, 629  
9 F.3d 1127 (9th Cir. 2011) [which case was not cited by the moving parties] holds  
10 that facts surrounding the arrest, and not merely the plea entered by the criminal  
11 defendant, may be considered by the court in ruling on a *Heck* Motion, depending  
12 on the circumstances of the arrest and the alleged excessive force claim. Without  
13 the deposition testimony of the Defendant Police Officers the Plaintiff is unable to  
14 fully and completely respond to the Defendants' *Heck* Motion for Summary  
15 Judgment. Without their deposition testimony, the Plaintiff is unable to inform the  
16 court of the facts and circumstance of his arrest and the excessive force committed  
17 by the Defendants during his arrest. Without this excessive force evidence, the  
18 court is unable to make a determination whether "success in [Plaintiff's] § 1983  
19 claim that excessive force was used during [his] arrest would necessarily imply or  
20 demonstrate the invalidity of [his] conviction under § 1248 (a) (1)." Whether the  
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1 chain of events of his arrest and Plaintiff's claim of excessive force is, or is not,  
2 one continuous transaction, or whether it makes any difference given the holding in  
3 *Hooper*, cannot be determined without the depositions of the Defendant Police  
4 Officers.  
5

6 9. In order to present the court with evidence of the events that  
7 transpired during his arrest, the depositions of the Defendant Police Officers are  
8 absolutely necessary. Without the testimony that the Defendant Police Officers  
9 will provide the Plaintiff is unable to present material evidence of what transpired  
10 during the course of his arrest and the continuing nature of the arrest, and is  
11 therefore unable to fully and completely respond to the Defendants' *Heck* Motion  
12 for Summary Judgment.  
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16 10. For all of the foregoing reasons, Plaintiff applies to this court for an  
17 order either denying, deferring order continuing the Defendants' *Heck* Motion for  
18 Summary Judgment to a future date following the completion of the Internal  
19 Affairs investigation and after Plaintiff has had an opportunity to depose  
20 Defendants Gunn, Baumgarten and Edwards.  
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1 I declare under penalty of perjury pursuant to the laws of the State of  
2 California that the foregoing is true and correct.  
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5 Executed this 12th day of June, 2012, at Woodland Hills, California.  
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8 By /s/ Michael Coletti  
9 Michael Coletti, Esq.  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I**

**UPON GOOD CAUSE SHOWN THE COURT MAY DEFER OR**

**CONTINUE A MOTION FOR SUMMARY JUDGMENT**

A Rule 56 Motion for Summary Judgment is subject to being denied, deferred or continued to permit the opposing party to obtain material discovery.

F.R.C.P. Rule 56 (d) provides:

“When facts are unavailable to the nonmovant, if a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.”

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II

**A STATE COURT CONVICTION FOR RESISTING**

**ARREST MAY NOT BAR A SECTION 1983 CLAIM**

**FOR EXCESSIVE FORCE**

The United States Supreme Court held in *Heck vs. Humphrey* 512 U.S. 447, 114 S.Ct. 2364 (1994) that where a criminal conviction arises out of the “same facts” as the basis for a subsequent 42 U.S.C. § 1983 claim, the 1983 claim must be dismissed. The Ninth Circuit has held that application of the *Heck* bar rests on finding that the criminal conviction (here for violation of California *Penal Code* § 148(a) for resisting arrest) arises out of the “same facts” as the 1983 claim. *Hooper vs. County of San Diego*, 629 F.3d 1127 (9th Cir. 2011).

Just as in the case as bench, the plaintiff in *Hooper* did not contest her guilty plea for violating Section 148(a)(1) nor did she dispute the lawfulness of her arrest. As with Plaintiff Smith, the *Hooper* plaintiff did contend that the defendant police officers used excessive force in response to her resistance.

Here, as pointed out in Section I, *supra*, discovery has not yet been conducted by Plaintiff as to the conduct of the Defendant Police Officers. Therefore, the Plaintiff has not yet conducted discovery material to the factual

1 issues that form the basis of Defendants' *Heck* Motion. Even absent this evidence,  
2 it is Plaintiff's position that the factual circumstance giving rise to his excessive  
3 force claim is separate and apart from the factual basis giving rise to his plea and  
4 conviction for resisting arrest, and therefore, his claims for violation of 42 U.S.C. §  
5 1983 and California *Civil* Code § 52.1, and his causes of action for Intentional  
6 Infliction of Emotional Distress and Assault and Battery, are not barred by the  
7 *Heck* decision.

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11 In this case, Plaintiff Preston Smith resisted arrest by fleeing the officers; he  
12 resisted, delayed or obstructed the Defendant Police Officers. Once the officers  
13 had control of Preston Smith he was tasered even though he was under their  
14 physical control and was not resisting arrest, giving rise to Plaintiff's claims.

15  
16 In *Hooper, supra*, the court recognized that:

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18 "[T]he California Supreme Court held that a conviction  
19 under § 148(a)(1) can be valid even, if, in a single  
20 continuous chain of events, some of the officer's conduct  
21 was unlawful. *Yount vs. City of Sacramento*, 43 Cal.4<sup>th</sup>  
22 885, 76 Cal.Rptr.3d 787 (2008). According to the Court,  
23 a conviction under § 148(a)(1) requires only that some  
24 lawful police conduct was resisted, delayed, or obstructed  
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1 during the continuous chain of events.” (629 F.3d at  
2 1131.)  
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4 The *Hooper* court went on to recognize that *Yount* held that the plaintiff’s  
5 “...claim was not *Heck*-barred because § 148(a)(1) contains no requirement that  
6 there be a distinct temporal separation between the use of reasonable force and the  
7 use of excessive force. If, at some time during the ‘continuous transaction’  
8 between an individual an officer, the individual ‘resists, delays, or obstructs’, the  
9 officer in the lawful performance of his or her duty, that is a violation of §  
10 148(a)(1). The individual’s ‘resisting, delaying or obstructing’, the officer does  
11 not lose its character as a violation of § 148(a)(1) if, at some other time during the  
12 same ‘continuous transaction,’ the officer uses excessive force or otherwise acts  
13 unlawfully.” (629 F.3d at 1132.) [Emphasis added.]  
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18 The *Hooper* court determined that “[t]he question before us is the basic *Heck*  
19 question – whether success in *Hooper*’s § 1983 claim that excessive force was used  
20 during her arrest ‘would necessarily imply’ or ‘demonstrate’ the invalidity of her  
21 conviction under § 148(a)(1). Given California law, as clarified in *Yount*, we hold  
22 that it would not.” (629 F.3d at 1133.)  
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1 The factual issues raised by Plaintiff's excessive force claims, and whether  
2 they are *Heck*-barred, must be viewed in a light most favorable to the party  
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4 opposing the defendant's Motion for Summary Judgment.

5 Defendant Officer Gun argues in his Motion for Summary Judgment that,  
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7 "... the criminal record demonstrates that Plaintiff violated *Penal Code* § 148(a)(1)  
8 during the entire period of time that he interacted with Offices Barumgarten and  
9 Edwards." [*Motion for Summary Judgment*, 9:21 - 23.] That is not the case. The  
10 record before this court does not resolve the factual issues of the timing of the  
11 sequence of events during the numerous times Smith was tasered. In fact, the  
12 record presented by the moving party's does not adequately address why the  
13 Plaintiff was tasered, how many times he was tasered or when in the course of the  
14 chase, detention and arrest the Plaintiff was tasered, or who was present when he  
15 was tasered. Nor does it resolve the excessive force issues alleged to have been  
16 perpetrated on the Plaintiff by the moving parties. All of these factual issues have  
17 to be addressed before a full hearing on Defendants' *Heck* Motion may be had.  
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22 The *Hooper* court unequivocally held that:  
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24 "[W]e conclude that a conviction under California *Penal Code* § 148(a)(1)  
25 does not bar a § 1983 claim for excessive force under *Heck* when the  
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1 conviction and the § 1983 claim are based on different actions during 'one  
2 continuous transaction.'" (629 F.3d at 1133.)  
3

4 The *Hooper* case stands for the proposition that there need not be a distinct  
5 temporal separation in the "continuous transaction." Therefore, an arrest might be  
6 initially lawful and later use of excessive force is actionable and not barred by  
7 *Heck*.  
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9 At the very least, the facts in the case at bench present triable issues of fact  
10 preventing entry of a Summary Judgment.  
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### 12 III

#### 13 THE MOTION IS PREMATURE

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15 Plaintiff Preston Smith was deposed on May 17, 2012 and on May 30, 2012.  
16 Pursuant to stipulation, Plaintiff has until June 15, 2012 and until June 19, 2012 to  
17 review the transcript to make any changes prior to signing under penalty of  
18 perjury. This opposition is due at a time prior to the stipulated dates and  
19 accordingly, the testimony of plaintiff cannot be offered to establish controverted  
20 facts. As such, the motion is premature.  
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IV

**CONCLUSION**

For all of the foregoing reasons, this court should deny Defendant's Motion for Summary Judgment, or, in the alternative, deny, defer or continue Defendants' Motion pending completion of the depositions of the Defendant Police Officers.

DATED: June 12th, 2012      LAW OFFICES OF MANUEL H. MILLER

By           /s/ Michael Coletti  
Michael Coletti, Esq.  
Attorneys of Record of Plaintiff